October Term, 1972

No. 72-620

HENRY A. GROUTER,

Appellant,

v.

ALTON J. LESSON, NEAL P. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT OF APPELLANT HENRY A. GROUTER

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JURISDICTIONAL STATEMENT.

Appellant, Henry E. Crouter, a parent of a child enrolled in a nonpublic school and intervenor defendant below, who is being assisted in this appeal by the Pennsylvania Association of Independent Schools (See footnote 2 below), by its counsel Henry T. Reath and Duane, Morris & Heckscher appeals from the final Order of the three-judge District Court entered on July 21, 1972. This Order perpetually enjoined Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania and her successors in office from paying out any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the Parent Reimbursement Act for Nonpublic Education for reimbursement to parents of children attending nonpublic schools who have paid tuition for education that meets the State's requirement for compulsory education.

Appellant Crouter submits this statement (and joins in the Jurisdictional Statement submitted on behalf of appellants Sloan, Diaz et al.) to show that this Court has jurisdiction of the appeal; that the questions presented have never been ruled on by this Court, and are substantial,—so substantial, in fact, that the very future of this country's historic commitment to pluralism in education and its desire to avoid the staggering financial burden to the taxpayers should nonpublic education fail, will be determined by the decision in this case.

OPINION BELOW.

On April 6, 1972, the District Court rendered its opinion denying the motions to dismiss filed by defendant Crouter and the other appellants (defendants below). After all Answers were filed, the District Court by Order of July 21, 1972, granted plaintiff's Motion for Summary Judgment on the Opinion of April 6, 1972. The Opinion is reported in 346 F. Supp. 1356 (1972) and is in the Appendix at page 1a.

JURISDICTION.

This action, to enjoin enforcement of a Pennsylvania Statute as unconstitutional was brought under 28 U. S. C. §§ 1331, 1343(3), 2201 and 2202 and was heard by a three-judge court pursuant to 28 U. S. C. § 2284. The final decree of the three-judge court was entered on July 21, 1972; Notice of Appeal was filed in the District Court by Appellant Crouter on August 21, 1972.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. C. § 1253. That jurisdiction is sustained by the decision of this Court in *Briggs v. Elliott*, 342 U. S. 350 (1952) and *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

STATUTE INVOLVED.

The statute involved is the Pennsylvania Parent Reimbursement Act for Nonpublic Education, Act 92 of the Laws of Pennsylvania, 1971, P. L. — (the "Act"), the full text of which is in the Appendix at pages 23a-28a.

The Act authorizes reimbursement of tuition payments to parents of any child enrolled in a nonpublic school that meets the requirements of Pennsylvania's compulsory school attendance law and the provisions of Title VI of the Civil Rights Act of 1964 (i.e. prohibiting discrimination because of "race, color or national origin."). The Act authorizes payments of up to $75.00 for elementary school children and up to $150.00 for secondary school children or the actual tuition amount paid whichever amount is lesser.

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QUESTIONS PRESENTED.

The questions presented are:

1. Where a state statute authorizes reimbursement for a portion of nonpublic school tuition to be paid, not to the school, but to parents, who alone have the choice whether to send their children to a secular or religious school, can it be said as a matter of law that the primary effect of such legislation is to advance religion in violation of the Establishment Clause of the First Amendment of the U. S. Constitution?

2. Where the principal requirement for parents' eligibility under the Act is that the school meet the state's requirements for compulsory education, and the amount of parent reimbursement is significantly less than the cost per pupil of public education, can it be said as a matter of law that the primary effect of such ~~litigation~~ legislation is to advance religion?

3. Did not the Court below, having found that the Act had a proper secular purpose—(i.e. to aid education and not to advance religion)—err in holding the Act unconstitutional where plaintiffs failed to offer any evidence to support a finding that the Act had a different primary effect,—to advance religion?

4. Where a state seeks to partially reimburse parents for tuition expense actually incurred at nonpublic schools, does the fact that the Act fails to require that funds disbursed to parents be restricted to secular education or general welfare services, violate the Establishment Clause?

5. Where state aid for nonpublic education is to the parent and not to an institution, does not this overcome any problems of entanglement between church and state?

STATEMENT.

On August 27, 1971, the Act became law. It created the Parent Assistance Authority to administer the fund established, but with the provisions that the Authority

> "exercise no direction, supervision or control over the policy determination, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic operation of any nonpublic school or schools. (Section 4, p. 26a.)

The Parent Reimbursement Fund (Section 5, p. 26a) does not depend on annual appropriations, but rather is funded by a set percentage of the revenue collected under Pennsylvania's Cigarette Tax Act.

To be eligible for tuition reimbursement (up to $75.00 for elementary school students and up to $150.00 for secondary students), each parent at the completion of the school year must file with the Parent Assistance Authority a verified statement that the student has completed the school year in a nonpublic school and that he has paid, or become legally obligated to pay tuition in excess of that claimed for reimbursement.

The legislature's statement of purpose, which was found by the Lower Court to be a valid secular purpose, declared inter-alia, that in light of the valuable contribution made by nonpublic education to the public welfare, it was in the public interest to use public funds to partially assist parents in defraying the cost actually expended by them for nonpublic education.[1]

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1. The full declaration of purpose states:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective the Commonwealth has had in force for many years a compulsory school attendance law.

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On September 13, 1971, the Appellees (plaintiffs below) brought this action naming as defendant the State Treasurer and contended that the Act violated the Establishment, Free Exercise, and Equal Protection clauses of the constitution. Thereafter, plaintiffs sought an injunction against paying out any funds.

On December 21, 1971, Henry E. Crouter, parent of a child in a nonpublic school whose counsel in this case also represents the Pennsylvania Association of Independent Schools ("PAIS"),[2] filed a motion pursuant to Rule 24(a)

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1. (Cont'd.)

(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established. Section 2, pp. 23a-24a.

2. The Pennsylvania Association of Independent Schools is a non-profit corporation organized and existing under the laws of Pennsylvania as an association concerned with the interests of its

to intervene as a party defendant, and an order granting his motion to intervene was entered December 27, 1971.

Subsequently 12 other parents of children enrolled in nonpublic schools in Pennsylvania were permitted to intervene.

All Defendants, including Crouter, moved to dismiss plaintiff's complaint, inter alia on the grounds that plaintiff's complaint which alleged that the Act on its face violated the Establishment Clause, failed to state a claim upon which relief can be granted.

On April 6, 1972, the three-judge District Court denied these motions. The Court in its opinion, contending that it was bound by this Court's decision in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), held that:

> ¶ The Act expressed a proper secular purpose i.e. to aid education and not advance religion;
>
> ¶ The fact that aid is given to parents and not to schools does not prevent the payments from having a primary effect of supporting religious instruction and

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2. (Cont'd.)

member schools in elementary and secondary education in this Commonwealth.

Its membership consists of 94 elementary and secondary schools, both private and church related, located throughout the Commonwealth, and for all practical purposes it represents almost all of the independent schools in this state.

All PAIS member schools admit all qualified students without regard to race, color, creed, or national origin.

All elementary and secondary member schools of the Association are accredited either by the Pennsylvania Association of Private Academic Schools or by the Middle States Association of Colleges and Secondary Schools and as such qualify to furnish education to Pennsylvania students under the provisions of the Pennsylvania Compulsory School Attendance Law.

PAIS was a party in interest in *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

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worship in church related schools. The effect of the Act is to aid these schools;

¶ Failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional;

¶ The Act, insofar as it may aid any parents to provide a religious education for their children, supports religion and violates the Establishment Clause.

On April 28, 1972, the three-judge court granted the appellants' motion to dismiss those counts of the complaint relating to the free exercise and equal protection clauses. Thereafter all defendants filed answers, and appellee and intervenor defendants Seth W. Watson and Anne P. Watson filed motions for summary judgment, which were denied by order of June 20, 1972.

Thereafter, on July 21, 1972, and based on the Opinion of April 6, 1972, the three-judge court ordered that plaintiffs' motion for summary judgment be granted and that defendant and her successors in office be perpetually enjoined from paying any funds under Act No. 92.

THE QUESTIONS ARE SUBSTANTIAL.

1. Introduction.

The questions raised by this appeal are substantial in that:

1. The form of aid provided by the Pennsylvania Act now under attack (i.e., to parents for reimbursement of tuition already paid—rather than by payments directly to the institutions involved) has never been reviewed by this Court.

2. Unless this Court now makes clear that the rules laid down in *Lemon v. Kurtzman* and *Tilton v. Richardson* apply only to grants made directly to religious institutions or religious orders, and *not* to a payment or tax credit[3] to parents, then:

(a) the will of the people of Pennsylvania, as expressed through their elected representatives in the legislature will have been thwarted with serious economic consequences to nonpublic as well as public education in Pennsylvania; and

(b) it will for all practical purposes, be impossible for the states or the federal government to make any significant financial commitment to

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3. It has been contended by some commentators that a federal tax credit would pass constitutional muster. In reality, this is no different than parent reimbursement. In both cases, the net financial effect to the parent who pays taxes is exactly the same—i.e., either cash in hand or cash credit against taxes owed. Furthermore, there is no difference, insofar as entanglement between church and state is concerned,—because in neither situation is any effort made by or required of the granting authority to check on the scope of religious activities. A tax credit or a payment to parents is self-policing.

In one important respect, however, parent reimbursement poses fewer constitutional problems. Since tax credits are of no value to low income families who pay no tax, it has been argued by those opposing tax credits that a tax credit constitutes discrimination against the poor—and violates the equal protection clause of the Fourteenth Amendment.

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nonpublic education that will preserve our system of pluralism and the healthy competition that exists among our various forms of secondary schools,—public, private and religious. Should this come to pass, state and local governments will be faced with a financial crisis they cannot meet [4] and we will have lost a priceless historical heritage and asset, which, once destroyed, can never again be recovered. See President Nixon's Message to the Congress of March 3, 1970, a portion of which is reproduced below.[5]

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4. See footnote 1, Legislative Declaration of Purpose No. 4 and footnote 5 below.

5. No clearer or more eloquent concise statement can be found posing the serious national crisis which confronts us than the following passage from the Message of President Nixon on Education Reform to the Congress of the United States, March 3, 1970, where he stated:

"(f) Non-Public Schools.—The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results."

"Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The nonpublic schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wide range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans."

"Up to now, we have failed to consider the consequences of declining enrollments in private elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools."

The Pennsylvania Parent Reimbursement Act establishes a program which has never before been ruled on by an opinion of this Court—i.e., a program whereby parents of children attending nonpublic schools meeting the state's standards for compulsory education, are eligible for partial reimbursement, only after they have paid or become legally obligated to pay tuition to a school of the parents' own choosing.

In some respects it is similar to the federal legislation authorizing the expenditure of federal funds for the education of pages serving in the Congress and the U. S. Supreme Court.[6] That act, which has been in effect and unchallenged for over 25 years, expressly provides that pages may choose to attend private or parochial schools of their free choice and that payments shall be made directly[7] to such schools, but at a rate no greater than that provided for in the public schools.

Also, under the GI Bill, thousands of veterans have used government funds at all kinds of schools, both religious and otherwise, even including attending divinity schools. 72 Stat. 1177 (1958), 28 U. S. C. Section 1620.

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5. (Cont'd.)

"If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities."

"There is another equally important consideration: these schools—non-sectarian, Catholic, Protestant, Jewish and other —often add a dimension of spiritual value giving children a moral code by which to live. This government cannot be indifferent to the potential collapse of such schools."

6. August 2, 1946, C. 753, Title II Section 243, 60 Stat. 839 2 U. S. C. Section 888a(b).

7. In this regard, the provisions of the Parent Reimbursement Act pose even fewer constitutional problems—since as noted in Section 5 below, there are significant constitutional differences between payment to parents and payment to the school or religious order itself.

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2. This Court's Decision of October 10th in the Ohio Case of Wolman v. Essex Does Not Control This Case.

We cannot believe that it was the intention of this Court, by refusing to hear the Ohio case (*Wolman v. Essex*, 342 F. Supp. 399 (S. D. Ohio 1972), *Essex v. Wolman*, U. S. Supreme Court, No. 71-1664) to rule, without consideration of briefs, let alone full argument before the Court, that *any* form of tuition aid to parents for nonpublic education expense actually incurred, is per se unlawful and violates the Establishment Clause of the First Amendment of the Constitution. Yet that is precisely the way the Court's decision has been interpreted by the media, commentators, the general public and opposing counsel in this case.[8] Of necessity this would in fact be the result, if this Court were to now refuse to hear the defendants' appeals in the instant case.

There are both substantive and procedural issues that distinguish this case from the Ohio case. There are at least two basic Constitution issues raised by defendants' appeals in this case that were not raised by defendants in the Ohio case—and thus not considered or ruled upon by this Court.

Furthermore, such an important national issue should not be so summarily disposed of. As of this writing, there are ten states, whose duly elected Legislators representing in excess of 88 million persons, have enacted, or have under consideration enactment of, some form of tuition aid to parents and have allocated conservatively in excess of $150 million dollars as their commitment to preserving pluralism in education.[9]

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8. See Motion to Dismiss or Affirm filed by counsel for plaintiffs in response to Jurisdictional Statement filed by counsel for Jose Diaz et al. at pp. 2 and 3.

9. Seven states have enacted laws providing for some form of tuition aid to parents of nonpublic school children: Connecticut, Maryland, Ohio, Pennsylvania, Illinois, New York and Minnesota.

If the Court were to now refuse to hear the instant appeal, the result would be not only a harsh denial of due process of law to the people of Pennsylvania and the millons of people in other states who have such a vital stake in such laws; but also there would be widespread public misunderstanding as to how such an important national issue could be decided in such fashion.

The Ohio court's decision in *Wolman v. Essex*, 342 F. Supp. 399 (S. D. Ohio 1972) does not, and should not, decide the issues presented by this case.

(a) The Ohio Court's opinion was based upon a full and thorough review of an extensive factual record much of which was irrelevant on constitutional grounds but from which it could have been argued that its effect was different from its stated purpose—i.e. that its effect was to favor a particular religious denomination. On the contrary, *no evidence concerning any factual issues has been submitted in this case.* Moreover, as noted by intervenor defendant Crouter's motion to strike, and motion to alter or amend judgment (See Appendix, p. 20a), any inquiry concerning a parent's use of the reimbursement, his religious views, or the religious practices at schools attended by his children violates his freedom of conscience and religion, and invades his privacy. (See discussion below at 5(c).)

(b) The court in *Wolman* held that even though the class which the statute benefited is small and sectarian, that was not grounds for holding it *per se* unconstitutional; the Ohio statute failed because of entanglement since each year the Ohio general assembly had to appropriate funds for parent reimbursement. Significantly, although the entanglement issue was argued to

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9. (Cont'd.)

Similar legislation has been proposed in Louisiana, West Virginia, and California. National Catholic Educational Association; *State Aid to Nonpublic Schools,* (1972).

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the Court below; it did not—and could not—find that the Pennsylvania Act posed a danger of undue entanglement between government and religion. The Act does not depend for funding upon annual action by the Pennsylvania legislature since its funding does not require annual appropriations. Compare *United States v. Butler*, 297 U. S. 1 (1936) with *Mulford v. Smith*, 307 U. S. 38 (1939) and *Wickard v. Filburn*, 317 U. S. 111 (1942).

(c) The Jurisdictional Statement filed by appellants Sloan and intervenors Diaz, et al. raises an additional constitutional issue not raised or considered in the Ohio case—i.e., that excluding from benefits of the Act parents who choose a religious education for their child, violates the parents' equal protection rights.

(d) Finally, by the time *Essex v. Wolman* reached this Court, the issue was moot for Ohio residents since the Ohio legislature enacted a tax credit program for parents of nonpublic school children, and the constitutionality of that enactment is presently being challenged in *Kosydar v. Wolman* (Civil action 72-212, D. C. S. D. Ohio, Eastern Division). The present appeal, however, presents a crucial determination for the people of Pennsylvania, since more than $51 million dollars has been accumulated in the fund from the cigarette tax, which but for these proceedings could now be paid out for the school year 1971-72.

3. This Court Should Now Review the Action of the Lower Court Which, Without Any Factual Record, Made the Unjustified Finding as a Matter of Law That Any Form of Tuition Aid to Parents Constitutes Advancement of Religion.

This Court should now take jurisdiction and hear defendants' appeals to right an egregious wrong to the people

of Pennsylvania,—and to make clear the limits within which state action may be used to aid all nonpublic education, which, though it may have an incidental effect of giving indirect aid to religious schools, does not constitute state "advancement of religion."

At the outset, the problem should be put in proper focus. Proponents of state aid for nonpublic education do not have the burden of showing it is constitutional. To the contrary, that burden rests with those who seek the exercise of the extraordinary power of the federal courts to declare state action unconstitutional. And it is a very heavy burden. This Court has stated many times that it will only act in clear cases, where plaintiffs have met their burden of proof by relevant and constitutionally admissible evidence. This is not one of them.

As developed below, the record of this case is totally devoid of *any* evidence that the effect of the Pennsylvania Act so deviates from its avowed and proper purpose as to declare it unconstitutional.

The clear purpose and undeniable effect of this legislation was and is to aid all forms of nonpublic education—i.e. both private and religious schools by easing the financial burden of the parents who must pay the bills and to safeguard the public treasury against the staggering drain that would occur if these schools were to collapse.

To say that under a parent reimbursement bill the parent acts as a mere conduit to the school not only is a premise without any factual foundation in the record but denies and undermines the very basis upon which our Constitution and Bill of Rights is founded—i.e., personal liberty, a belief in private institutions and the right of each individual to make his own free choice. Where the parent is the recipient of state aid, he stands as the wall of separation between church and state, and enables the state to meet

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its legitimate aims, assistance to secular education, and at the same time preserve its proper role of neutrality by neither advancing nor inhibiting religion.

While it is true that religious schools of the Catholic faith predominate in the field of nonpublic education, there are a host of private schools, as well as schools controlled by or related to other religious faiths such as Friends (Quaker), Lutheran, Presbyterian, Episcopalian, Methodist, Jewish, and other denominational church related schools which enthusiastically support the Pennsylvania Act and whose parents would benefit from its provisions. That is precisely why the Pennsylvania Association of Independent Schools has authorized its counsel to assist defendant Crouter in pressing this appeal, and why the National Association of Independent Schools is filing an amicus brief in this case.

We readily concede, and could not in good conscience argue to this Court otherwise, that one of the effects of parent reimbursement is to indirectly benefit the entire nonpublic system of education in Pennsylvania, including parochial and other religious schools. But as Mr. Chief Justice Burger in *Tilton v. Richardson*, 403 U. S. 672 (1971), and this Court in earlier cases [10] have so clearly pointed out, there is a critical difference between state action which may *benefit* religion or religious institutions, and state action which sponsors or constitutes the *advancement of religion*. Only the latter violates the Establishment Clause, which we submit, if your Honors decide to hear this case, should now be reexamined in light of its true historical purpose—i.e. to prevent the formation of any government "established

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10. *Everson v. Board of Education*, 330 U. S. 1, 17 (1947); *Zorach v. Clauson*, 343 U. S. 306, 314 (1952); *Board of Education v. Allen*, 392 U. S. 236, 244 (1968).

church", whether it was an established Church from Rome, England, or from any other religious denomination.[11]

It certainly was not the purpose of our founding fathers to outlaw religion or to turn us into an agnostic state. As Mr. Chief Justice Burger has so eloquently pointed out in *Walz v. Tax Commission,* 397 U. S. 664 (1970), the role of government in this area should be one "of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference".

We believe and urge upon this Court that upon a careful examination of the record, it will be determined that:

¶ Plaintiffs have failed utterly to establish by competent admissible evidence that the effect of this Act advances religion or involves state action in sponsorship of religion; and

¶ Because of the constitutional restraints discussed below, and the inherent differences between payment to a parent and payment to a religious school,

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11. In this connection, see the following opinion by Judge Palmieri in *Committee for Public Education and Religious Liberty v. Levitt,* Civil Action No. 70-3251 (S. D. N. Y. filed April 27, 1972), where, in refusing to join in an order invalidating state action giving aid to nonpublic schools for auxiliary administrative services, he stated as follows:

> "To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis. It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of these who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.
>
> I am constrained to decline to particpate in destroying this legislative act by judicial action." . . .

The full text of Judge Palmieri's opinion is cited in the brief of Appellee, PAIS, etc. in *Lemon v. Kurtzman,* second appeal, October Term, No. 71-1470 at pages 31-34.

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plaintiffs cannot prevail in their effort to thwart the legitimate aims of the people of Pennsylvania to support nonpublic education and to avoid the catastrophic financial impact they would suffer [12] if nonpublic education were to fail because of the serious financial crisis facing it.[13]

4. The Lower Court Misinterpreted and Misapplied the Rules Laid Down by This Court in *Lemon v. Kurtzman*.

This Court, in the Opinion of Mr. Chief Justice Burger in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) summarized the 3-fold test for measuring whether public aid to nonpublic education violates the Establishment Clause:

> "¶ First, the statute must have a secular legislative purpose;
>
> ¶ Second, its principal or primary effect must be one that neither advances or inhibits religion; *Board of Education v. Allen*, 392 U. S. 236, 243 (1968);
>
> ¶ Finally, the statute must not foster "an excessive government entanglement with religion." 403 U. S. at 612-613. (paragraphs supplied for clarity)

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12. See in particular footnote (5) above from President Nixon's Report on Education Reform to the effect that if all private schools were to close or turn public, the added burden on public funds up to the end of the 1970's would "exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities."

To the same effect, see Legislative Declaration of Purpose No. 4 taken from footnote 1 at page 4 with respect to the financial impact such closing would have on Pennsylvania.

13. For further documentation of the financial crisis facing parochial education in the Philadelphia area, see Report of the Gurash Committee—"Report of the Archdiocesan Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties", an abridged copy of which has been annexed to and made a part of the brief for Appellee Pennsylvania Association of Independent Schools in the matter of *Lemon v. Kurtzman*, Appeal No. 2, U. S. Supreme Court, October Term 1972, No. 71-1470.

It will be remembered that in *Lemon v. Kurtzman* (the Pennsylvania Act authorized direct payment to religious or secular schools for purchase of secular educational services) this Court:

¶ found a proper secular legislative purpose;

¶ declined to rule on whether the Act had a primary effect that advanced religion but inferentially concluded that it did not and let stand the Lower Court's ruling that it did not (see 403 U. S. at 613-614); but

¶ ruled that the controls imposed on the institutions receiving funds, to insure the funds would not be used for religious purposes, constituted undue entanglement between church and state so as to void any payments to religious schools.

There is nothing in the Court's decision in *Lemon v. Kurtzman* that controls or bars reimbursement to parents under the Act here considered. To the contrary, this Court has on frequent occasions pointed out that in Establishment Clause cases the facts in each case must be carefully analyzed. Some of the general principles applicable are:

1. There is no precise and absolute test; "we can only dimly perceive the boundaries of permissible government activity in this sensitive area . . ." *Tilton v. Richardson*, 403 U. S. 672, 678-679 (1971);

2. The role of government is to be neutral—it must neither advance nor inhibit religion. *Board of Education v. Allen*, 392 U. S. 236, 242-43 (1968); its role is that of "benevolent neutrality." *Tilton, supra* at 669;

3. The test is not whether a religious institution may be benefited, but whether the principal effect of the Act is to advance religion. *Tilton, supra* at 679;

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4. The American public places a high value on the importance of nonpublic education.[14]

The foregoing principles are best summarized in Mr. Chief Justice Burger's Opinion in *Walz v. Tax Commission*, 397 U. S. 664 (1970) at 669:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: *that we will not tolerate either governmentally established religion or governmental interference with religion.* Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. (Emphasis added.)

5. The Lower Court Erred in Concluding That Payment to Parents Was a Distinction Without a Difference. Payment to the Parents Makes All the Difference.

(a) Parent Becomes a Wall of Separation Between Church and State.

The lower Court held that payments to parents, rather than to the schools, was a distinction without a difference.

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14. ". . . private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create.

Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly sug-

We believe that this distinction makes all the difference.

When funds are paid to the parents, this represents the classic case where the government is preserving its traditional role of "benevolent neutrality", of neither advancing nor inhibiting religion. The parents become the wall of absolute separation between church and state. They and they alone make the choice [15] between public, secular, private or religious school. Since neither the state nor the school can control the funds, neither has any leverage nor any points of friction or contact between the other.

Furthermore, it can hardly be said, as did the Court below, that the parent serves as a mere conduit— where as in this case, reimbursement is only made after tuition has been paid. When the parent receives the money, it is his and his alone to spend—on the races, put in the bank or whatever he chooses to do.

(b) The Reimbursement Does Not Advance Religion Since the Amount Paid Is Less Than the Cost Per Pupil of Public Education.

Where, as in this case, the amount of reimbursement is substantially less than the per pupil cost of public education,[16] how can it be contended, even if the conduit theory

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14. (Cont'd.)
gests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students." (*Board of Education v. Allen*, 392 U. S. 236 at 247-248).

15. The parent's absolute freedom of choice is very real. It means that no school, religious or otherwise can indefinitely count on getting the funds appropriated to the parents since the parent always possesses the absolute right to withdraw his child, and send him to another school or pass up the payments entirely and send his child to public school.

16. The total general fund expenses compiled from the annual financial reports of Pennsylvania school districts show a total cost per public school pupil in the school year 1969-70 of $943.22. Statistical Report of the Secretary of Education for the school year ending 1970.

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was accepted, that public funds are used to advance religion—since under the Act, any school to qualify for parent reimbursement must meet the state's same high standards for compulsory education as do the public schools?

(c) It Is Irrelevant and Beyond the Scope of Constitutional Inquiry to Require Parents to Divulge Whether Their Child Attends a Religious School.

Finally, on purely constitutional grounds, there is a basic and fundamental legal difference between payments to parents and payment to, for example, a religious school or order. Where payment is made to the parent, that must be the end of any further inquiry of what happens thereafter to the money. For it seems patently clear that the very same First Amendment, which opponents of the Act so zealously profess to protect, likewise forbids inquiry of the parents by the state, or the courts, regarding the presence or absence of religious practices at the school to which they elect to send their child.[17]

Thus, for good and valid constitutional grounds, where payments are made to individual parents, it is beyond the scope of permissible inquiry to even attempt to establish as a legal proposition that public funds are used for or diverted by the parents to religious purposes. For the same reason, it would be beyond the right of welfare officials to

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17. Any such inquiry would violate the parents' free exercise rights and their traditional freedom of choice and conscience in matters of educating their children and of religion, as well as their right of privacy. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Baird v. State Bar of Arizona*, 401 U. S. 1 (1971); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 129 (S. D. N. Y. 1969) affirmed 401 U. S. 154 (1971); *Shelton v. Tucker*, 364 U. S. 479, 488 (1960); *Griswold v. Connecticut*, 381 U. S. 479 (1965).

The Court below recognized this problem but failed to come to grips with it. See discussion below, p. 23, especially footnote 19.

probe into the religious practices of a charity to whom an individual on welfare elected to make a contribution out of money given him and intended for food.

Under these circumstances, the Lower Court clearly erred in resting its entire decision on the premise that the Act supports religion, particularly where the record was devoid of any evidence that public funds were in fact used by parents to secure religious education.

The Court held the Act unconstitutional on two grounds:

> 1. "The mere fact that the Act does not require that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities," citing as its authority *Tilton, supra* (See opinion at Appendix 14a).
>
> 2. The unsupported finding in its order of July 21st that "more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith." (See Appendix p. 18a).

The Court's reliance on *Tilton* for proposition number one above is totally unjustified. That requirement in *Tilton* applied to a direct grant of funds to a religious institution for physical facilities,—and was mandated by this Court to insure that at no time in the future would the facilities be used for religious purposes. It has no application whatsoever to the case at bar.

The Court's reliance on the statement that 90% of the children attending nonpublic schools attend schools con-

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trolled by religious organizations is likewise the weakest kind of bootstrap jurisprudence. Putting aside whether the statement is factually correct [18] the fact remains that the lower court assumed a premise which may be essentially correct, but which, because of the interposition of the parents and their constitutionally protected status cannot be established as a legal proposition or the basis of a constitutional attack.

Thus, the Court below, in order to justify a decision they had already reached, completely disregarded the crucial constitutional issue discussed above,—which it recognized as a serious problem in footnote 5 of its opinion of April 6, 1972 but which it declined to rule on at the pleading stage as premature.[19] Two months later (see

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18. There is no evidence in the pleadings or record to support the accuracy of this statement.

19. Footnote 5 of the Court's opinion reads as follows:

> [5] Defendant intervener Crouter has moved under F. R. Civ. P. 12(f) to strike paragraph 10 of plaintiff's complaint as immaterial and as requiring inquiry into the religious practices and character of schools to which parents choose to send their children in violation of the parents' rights of free exercise of religion, privacy, and freedom of expression.
>
> F. R. Civ. P. 12(f) provides that "the court may order stricken from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendant maintains that the allegations of paragraph 10 concerning the religious character of nonpublic schools are constitutionally irrelevant because the Act does not give aid to schools, but to parents. However, the issue of whether the Act aids religious schools or aids parents to provide a religious education for their children is one of the issues in dispute in this litigation, and the allegations of paragraph 10 are certainly relevant to the plaintiffs' claims.
>
> ". . . The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversey." *Brown and Williamson Tobacco Corp. v. U. S.*, 201 F. 2d 819, 822 (C. A. 6, 1953). *See also Augustus v. Bd. of Public Instruction*, 306 F. 2d 862, 868

Order of July 21, 1972, Appendix, p. 18a) the Court decided this critically important constitutional question without any discussion or citation of cases but by blandly assuming as a proved fact that which was denied, put at issue in the pleadings and vigorously objected to on constitutional grounds. (See in particular Defendant Crouter's Motion to Amend Judgment filed on August 3, 1972 and reprinted at Appendix, pp. 20a-21a).

6. The Proper Test Under the Establishment Clause Is Not Whether the Act Benefits Schools, Religious or Secular, But Whether It Advances Religion.

The ultimate issue is whether the Act has the primary effect of advancing religion. State action can benefit religion or religious institutions without advancing religion. By authorizing payments directly to eligible parents, the Legislature has structured the Act to avoid entanglement and to prevent it from having any involvement in, let alone advancement of, religion.

As noted previously, in *Lemon v. Kurtzman*, 403 U. S. 602, despite the vigorous arguments of appellants, this Court refused to rule that the principal or primary effect of the statute was one which advanced religion. It thus left undisturbed the finding of the lower court that the primary effect of the Act did not do so.

In *Tilton v. Richardson*, Mr. Chief Justice Burger reaffirmed this Court's extreme reluctance to assume that the

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19. (Cont'd.)

(C. A. 5, 1962), 2A J. Moore, *Federal Practice* § 12.21[2] (2d ed. 1968).

Defendant's further objection concerning the constitutionality of inquiring into the religious character of the schools *is premature and should be raised once such information is actually sought.* We therefore deny defendant intervener's motion to strike paragraph 10. (emphasis added).

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proper purposes of a carefully drafted Act will be subverted in the actual administration of the Act:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." 403 U. S. at 679.

Nevertheless, even though the Act does not fix eligibility along religious lines, nor in any way restrict the parents' use of the reimbursement payments, the Court below held the Act invalid on the ground that parents can possibly spend the money at church-related schools since the State does not preclude use of its funds to support religious activities.

The Court below then erroneously concluded that the Act's primary effect is to advance religion and as noted above, made this finding as a matter of law without any factual record to support its ruling that the effect differed materially from the primary purpose of state aid to education. In reaching such a conclusion, the Court has misconstrued the true meaning of the term "advancement of religion."

This Court has, on many occasions, taken great pains to distinguish between programs that advance religion contrary to the First Amendment and acts that may indirectly benefit religious institutions as permitted by the Amendment. In so doing it has upheld

> ¶ the right of Catholic schools to fulfill compulsory educational requirements *Pierce v. Society of Sisters,* 268 U. S. 510 (1925)

¶ transportation reimbursement payments to parents (*Everson v. Board of Education*, 330 U. S. 1 (1947))

¶ released time for religious instruction from public school (*Zorach v. Clauson*, 343 U. S. 306 (1952))

¶ textbook loans to nonpublic school children (*Board of Education v. Allen*, 392 U. S. 236 (1968))

¶ construction grants to sectarian institutions of higher learning (*Tilton v. Richardson, supra*, 1971)

In the non-educational area, there are many decisions affirming the constitutional propriety of state action that clearly benefits religious institutions without advancing religion:

¶ Grants to religious orders for hospitals (*Bradfield v. Roberts*, 175 U. S. 291 (1899))

¶ Sunday closing laws (*McGowan v. Maryland*, 366 U. S. 420 (1961))

¶ Tax exemption from property taxes *Walz v. Tax Commission of the City of New York*, 397 U. S. 664 (1970)

The test, as stressed by Mr. Chief Justice Burger in the Court's Opinion in *Tilton, is not whether there is a incidental benefit to religion—but whether the primary effect of state action is to advance religion.* See *Tilton, supra* at 679.

Advancement of *religion* results only when the state *actively* and *directly* promotes religion, such as by the establishment of a state church or by insisting on Bible reading or compulsory prayers. Thus, over the years, the Supreme Court has invalidated education laws on the grounds of primary religious effect in only three cases:

¶ *Abington v. Schempp*, 374 U. S. 203 (1963) (compulsory school prayers)

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¶ *Engle v. Vitale,* 370 U. S. 421 (1962) (compulsory school prayers)

¶ *Illinois ex rel. McCollum v. Board of Education,* 333 U. S. 203 (1948) (religious instruction in public schools).

The practices struck down all involved religious exercises in *public* schools and were also programs whose *purpose* was *to advance* religion. By contrast, in the five cases upholding state benefits to nonpublic institutions, individuals were exposed to the benefited institutions only by their own free choice. See *Tilton v. Richardson, supra; Walz v. Tax Commission, supra; Board of Education v. Allen, supra; Everson v. Board of Education, supra; Quick Bear v. Leupp,* 210 U. S. 50 (1908).

7. State Aid for Nonpublic Education to the Parent and Not to an Institution Overcomes Any Problems of Entanglement Between Church and State.

The Court below, and we submit properly, rejected plaintiff's contentions that the Act was unconstitutional because of entanglement problems.

The entanglement problems were overcome, first, by removal from the parent reimbursement act of the "restrictions and surveillance" which had been written into the Pennsylvania Act 109 for purchase of service contracts for secular education and which caused this Act to be stricken down in *Lemon v. Kurtzman* (see *Lemon v. Kurtzman, supra* at 620-621).

Secondly, there are in the present Act no payments to any religious schools or institutions, thereby removing the situation "pregnant with involvement" to which this Court in its opinion in *Walz* addressed itself. In *Walz,* the issue was the extent to which a benefit could be conferred directly on a religious institution. In that situation, the Court

pointed out the grave entanglement problems that would result from a direct money subsidy to such a religious institution.[20]

Clearly, when the benefit is conferred on the parent, either by tax credit or by reimbursement—which both have the same effect in terms of net dollars to the parent (see footnote 3 above), the problem of administrative entanglement does not exist, since there are no strings attached to the benefit other than that the recipient certify that he has spent X dollars on tuition at a nonpublic school.

Furthermore, with respect to the problem of political entanglement, that doctrine would not apply where, as here, the recipient is an individual person—a citizen of the United States, clothed as he is with the Constitutional protection and guarantee of his rights of free speech, freedom of assembly, freedom of petition, et cetera.

Finally, as pointed out at pp. 12-13, *supra,* there do not exist in the Pennsylvania Act the entanglement problems which prompted the lower court to strike down the Ohio statute. The Pennsylvania Act is self-executing in that the funds are automatically allocated from the cigarette tax, and do not require the kind of annual general appropriations as were present in the Ohio case.

CONCLUSION.

Historically, private elementary and secondary education has made a significant contribution to and played a

20. See *Walz, supra* 397 U. S. at 675:

Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, would encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and operation. (footnote omitted).

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unique role in this country. It must be preserved if we are to retain the pluralism and spirit of democracy to which our Constitution and judicial system are dedicated. However, the continued viability and vitality of private education is imperiled by the severe economic crisis facing it.

Fortunately, our people are at long last moving towards solutions, as their elected representatives in the Congress and state legislatures throughout the land genuinely experiment to find ways that public monies can be used to further nonpublic education and still preserve the neutrality of government by neither advancing nor inhibiting religion in the process.

The cases are legion in church-state relations where the judicial branch of Government has been called on as the arbitrator, in the delicate balancing of conflicting interests. While there always will be a wide diversity of views, the fact remains that a majority of the Justices of the Supreme Court in decisions from *Bradfield v. Roberts,* 175 U. S. 291 (1899) to *Lemon v. Kurtzman,* 403 U. S. 602 (1971) have recognized certain basic principles of constitutional law that lead inexorably to the conclusion that the will of the people of Pennsylvania should not be thwarted by declaring the present Act unconstitutional. These principles are:

¶ Public aid to private education serves a proper public purpose.[21]

¶ It is possible to separate religion from sectarian education. A majority of the Justices have rejected[22]

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21. *Everson v. Board of Education, supra* at 7; *Board of Education v. Allen,* 392 U. S. 236, 247-248 (1968).

22. See Opinion of Mr. Chief Justice Burger, in *Lemon v. Kurtzman,* 403 U. S. at 613 where he stated:

"The legislatures of Rhodes Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion."

And also Court's Opinion in *Tilton,* 403 U. S. at 679-680.

the absolutist view that religion and secular education are so intertwined, with each permeating the other, that any form of aid to education that in any way benefits religion must be totally barred by the First Amendment.

¶ It is both possible—and constitutionally permissible to distribute public funds or use state action in such a way that religion and religious institutions may indirectly benefit—and yet preserve government neutrality.[23] This is particularly so where funds are paid not to the institution, but to those who directly benefit and can control their use.

Finally, we recognize and are sensitive to the awesome and difficult responsibility which would face this Court in deciding the questions raised by this appeal that so vitally affect the national interest—i.e. whether pluralism or a monolithic structure of public education is to prevail. We believe that the former is more in keeping with the free democratic traditions of this country—but in truth, this is a question of educational philosophy to be resolved by the people in open debate through their elected representatives and not a legal issue which this Court must resolve.

Mindful of the frequent admonition that a Court's power to declare state action unconstitutional should be sparingly exercised, only in compelling circumstances, and then only with great care,[24] we urge this Court to hear the defendants' appeals so that any doubts as to the constitutionality of the Pennsylvania Act may be resolved in favor of its validity. This is particularly so in view of the strong public interest, as evidenced by extensive state action in

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23. See Discussion *supra* pages 23-25.

24. *Walters v. City of St. Louis*, 347 U. S. 231 (1954); *New York v. O'Neill*, 359 U. S. 1 (1959).

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this area[25] to preserve and improve the high quality of private education.

We ask this Court to hear defendants' appeals so that it may, after full consideration of briefs and oral argument, determine whether the Pennsylvania Parent Reimbursement Act:

¶ does have as its primary effect the advancement of religion?

¶ represents a lawful and valid expression of all the people of this Commonwealth of their genuine desire to (1) ease the financial burden of those parents who must pay the lion's share of the cost and (2) thereby avoid the resulting financial crisis to the public treasury should all nonpublic education fail?

¶ does not by reimbursing parents—rather than making payments to the schools or to religious orders that operate them—eliminate the objectionable entanglement feature that was held fatal to the Pennsylvania purchase of secular services plan in *Lemon v. Kurtzman*?

Respectfully submitted,

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ROBERT L. PRATTER,
JANE D. ELLIOTT,
DUANE, MORRIS & HECKSCHER,
Attorneys for Appellant.

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25. See text *supra* p. 11 and footnote 9.

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APPENDIX.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 71-2223.

ALTON J. LEMON, NEAL F. BRACKEN AND BENJAMIN S. LOEWENSTEIN

v.

GRACE SLOAN, STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA

JOSE DIAZ AND ENILDA DIAZ, HIS WIFE; WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE; F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE; ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE; DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE; AND SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE; AND HENRY R. CROUTER,

Interveners.

BEFORE: WILLIAM H. HASTE, Senior Circuit Judge JOSEPH S. LORD, III, Chief District Judge JOHN B. HANNUM, District Judge.

Opinion.

April 6, 1972

By JOSEPH S. LORD, III, *Chief District Judge*

Plaintiffs brought this suit to declare the Pennsylvania Parent Reimbursement Act for Nonpublic Education [1] (the

1. Act 92 of the Pennsylvania General Assembly, August 27, 1971. Appendix A, *infra*.

"Act") unconstitutional and to enjoin its operation. The Act is challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. This court has jurisdiction of the controversy pursuant to 28 U. S. C. §§ 1331, 1343(3), 2281 and 2284. Presently before the court are motions of defendant and intervening defendants to dismiss the complaint for lack of standing and failure to state a claim upon which relief can be granted.

The plaintiffs are citizens, residents and taxpayers of the Commonwealth of Pennsylvania who have paid the Pennsylvania cigarette tax which finances the Act. Plaintiff Lemon is also the parent of a Negro child attending a public school in Pennsylvania. Defendant Sloan is State Treasurer of the Commonwealth of Pennsylvania and is sued in that capacity. Intervening defendants are citizens, residents and taxpayers of the Commonwealth of Pennsylvania. Interveners are parents of one or more students who are enrolled in nonpublic schools in Pennsylvania and interveners are eligible for tuition reimbursement payments under the Act.

The Act provides for the reimbursement of tuition payments to parents whose children have completed the school year in a nonpublic school located in Pennsylvania which fulfills the compulsory school attendance requirements under Pennsylvania law and the requirements of Title VI of the Civil Rights Act of 1964.[2] In its legislative findings and declaration of policy, the Pennsylvania General Assembly determined that parents who send their children to nonpublic schools assist the state in reducing the rising cost of public education. The General Assembly found that if inflation and rising costs of education force parents of

2. Title VI prohibits discrimination on the ground of race, color, or national original in programs receiving federal financial assistance. 42 U. S. C. § 2000d *et seq.*

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children now enrolled in nonpublic schools to transfer a substantial number of their children to public schools, "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state.[3] Therefore, in order to insure that parents can continue to aid the state by sending their children to nonpublic schools and in order to foster-educational opportunity for all children, the General Assembly established the tuition reimbursement program.

The first ground of defendants' motion to dismiss is that the complaint fails to state a claim under the Establishment Clause of the First Amendment upon which relief can be granted.[4] Plaintiffs allege that the Act authorizes payment for the tuition of students in educational institutions which

> "* * * (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, cirriculums [sic] and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculation of religious values, (9) impose religious restrictions on faculty appointments, or (10) impose religious restrictions on what the faculty may teach." ¶ 10 Complaint.[5]

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3. Section 2(4), Act 92, Appendix A.

4. Defendants concede and we find that plaintiffs have standing to sue under the Establishment Clause. *Flast v. Cohen*, 392 U. S. 83 (1968).

5. Defendant intervener Crouter has moved under F. R. Civ. P. 12(f) to strike paragraph 10 of plaintiff's complaint as immaterial and as requiring inquiry into the religious practices and character

For the purpose of considering the motion to dismiss, we must accept these allegations as true. Therefore, the issue before us is whether the Establishment Clause prohibits the state from reimbursing parents for the tuition costs of sending their children to church-related elementary and secondary schools.

The Establishment Clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission,* 397 U. S. 664, 668 (1970). *See also* Everson v. Board of Education, 330 U. S. 1 (1947), *Engel v. Vitale,* 370 U. S. 421 (1962).

> "Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper whch can be used to measure the precise degree to which these three factors are present or absent. Instead, our analysis in this area must begin with a

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of schools to which parents choose to send their children in violation of the parents' rights of free exercise of religion, privacy, and freedom of expression.

F. R. Civ. P. 12(f) provides that "the court may order stricken from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendant maintains that the allegations of paragraph 10 concerning the religious character of nonpublic schools are constitutionally irrelevant because the Act does not give aid to schools, but to parents. However, the issue of whether the Act aids religious schools or aids parents to provide a religious education for their children is one of the issues in dispute in this litigation, and the allegations of paragraph 10 are certainly relevant to the plaintiffs' claims.

> "* * * The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversey." *Brown and Williamson Tobacco Corp. v. U. S.,* 201 F. 2d 819, 822 (C. A. 6, 1953). *See also Augustus v. Bd. of Public Instruction,* 306 F. 2d 862, 868 (C. A. 5, 1962), 2A J. Moore, *Federal Practice* § 12.21[2] (2d ed. 1968).

Defendant's further objection concerning the constitutionality of inquiring into the religious character of the schools is premature and should be raised once such information is actually sought. We therefore deny defendant intervener's motion to strike paragraph 10.

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consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause."

Tilton v. Richardson, 403 U. S. 672, 677-678; 29 L. Ed. 2d 790, 798 (1971).

In *Lemon v. Kurtzman*, 403 U. S. 602, 612-613; 29 L. Ed. 2d 745, 755 (1971), the Supreme Court restated the three tests it has developed for determining whether a particular program offends the Establishment Clause.

"* * * First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor prohibits religion, *Board of Education v. Allen*, 392 U. S. 236, 243, 20 L. Ed. 2d 1060, 1065, 88 S. Ct. 1923 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz, supra*, at 674, 25 L. Ed. 2d at 704."

The stated legislative purpose of the Act is to aid parents to continue to send their children to nonpublic schools thereby fostering educational opportunities for both public and nonpublic school children. The legislative findings and declaration of policy indicate that the General Assembly is concerned with maintaining the present standards of public education which it finds would be seriously jeopardized if parents of nonpublic school children could no longer afford tuition costs and were forced to send their children to public schools. "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Lemon, supra*, 403 U. S. at 613. Therefore, according the stated legislative intent appropriate deference, we conclude that the Act expresses a legitimate

secular objective consistent with the Establishment Clause. *See Allen, supra,* 392 U. S. 243; *Lemon, supra,* 403 U. S. at 613, *Tilton, supra,* 403 U. S. at 678-679,

We must next determine whether the Act has the primary effect of advancing religion. The very existence of this "test" reflects the Court's determination that there may be some forms of aid to church-related activities which do not involve that sponsorship, financial support or the active involvement of the state in religious activity which the Establishment Clause was intended to prevent. Although the Court "can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," *Lemon, supra,* 403 U. S. at 612, the Court has readily acknowledged that the test is not whether a religious institution derives some benefit from the government program. In upholding the constitutionality of federal aid for construction of buildings to be used for secular education at church-related colleges and universities, the Court stated:

> "* * * Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. [*Everson, supra, Allen, supra, Waltz, supra*] * * * The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." *Tilton, supra,* 403 U. S. at 679. *See also Walz, supra,* 397 U. S. at 671-672.

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In order to determine what factors distinguish permissible from prohibited aid, it is necessary to review briefly the Supreme Court decisions which have considered forms of aid to church-related schools under the primary effect test. In *Everson*, the Supreme Court upheld a state which authorized the use of tax-raised funds to reimburse parents for the costs of transporting students to and from public and private schools. The Court held that the state could extend the benefits of public welfare legislation to all citizens despite the fact that such aid helped children to get to church-related schools and that there was the possibility that some children might not have been sent to church-related schools if their parents were required to pay transportation costs. The Court found that the purpose and effect of the law was to promote general public welfare by helping parents get their children safely to and from accredited schools. The Court concluded that the First Amendment does not require that the state cut off sectarian schools from general services "so separate and so indisputably marked off from the religious function." *Everson, supra*, 330 U. S. C. at 18.

In *Allen*, the Supreme Court upheld a New York law which required local public school authorities to lend textbooks free of charge to all students in grades 7 through 12 including students attending private schools. The Court found no violation of the primary effect test for although the Court recognized that books can have an inherent religious significance which bus rides do not, the law provided that only secular books could be loaned and each book had to be approved by the public school authorities. The Court noted that the state has a legitimate interest in the manner in which private schools perform their secular education function. On the basis of the "meager record" in the case, the Court could not conclude that

> "* * * either all teachings in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 392 U. S. at 248.

Therefore, the Court upheld the law as providing a general service to all students which was consistent with the state's interest in promoting secular education in all schools.

In *Lemon*, the Court held that a Pennsylvania law which reimbursed private schools for the cost of teachers' salaries, textbooks and instructional materials in certain specified secular subjects and a Rhode Island law which supplemented the salaries of teachers of secular subjects in private elementary schools violated the Establishment Clause because the programs involved excessive government entanglement with religion. Although the Court found it unnecessary to apply the primary effect test, the Court's analysis of the statutes in terms of this test is instructive. The Court reaffirmed its agreement in principle with the holding in *Allen* that "secular and religious education are identifiable and separable." However, the Court noted that both the Pennsylvania and Rhode Island legislatures recognized that "church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities are religiously oriented." Therefore, in order to guarantee that state financial aid supports only secular education in these schools, the two legislatures imposed statutory restrictions on their aid programs. Although the Court did not reach the question of whether these restrictions effectively prevented the aid programs from having primary effect which violated the Establishment Clause, it is clear from the opinion that the Court agreed that given the nature of the proposed aid and the character of the school, the state

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was required to impose restrictions to insure that the aid benefited only secular education in order to comply with the Establishment Clause.

> "* * * The Rhode Island Legislature has not, *and could not,* provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. *The State must be certain, given the Religion Clauses, that subsidized teachers do not inculate religion*—indeed the State here has undertaken to do so." *Lemon, supra,* 403 U. S. at 619 (emphasis added).

Finally, in *Tilton,* the Court upheld the constitutionality of federal aid to church-related colleges and universities for construction of buildings and facilities used exclusively for secular educational purposes. In evaluating the statute in terms of its effect, the Court first reviewed the provisions of the law and found that it was carefully drafted to insure that federally subsidized buildings would be devoted to secular and not religious functions. However, the Court concluded that a provision of the law which permitted unrestricted use of the buildings after 20 years violated the Establishment Clause primary effect test. This decision represents the first instance in which the Court has invalidated legislation under that test.

> "* * * It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. * * * If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Tilton, supra,* 403 U. S. at 683.

The Court next examined the administration of the law and found that the restrictions on use had been complied with by the recipient institutions. Finally, on the basis of the record before it, the Court refused to conclude that religion so permeated the secular education provided by church-related colleges and universities that their religious and secular education functions were inseparable and that therefore government support of any activity of these institutions necessarily involved impermissible support of religion.[6]

These cases establish the following points of reference for any application of the primary effect test. First, absent any evidence to the contrary, the Supreme Court accepts the principle that secular and religious education in church-related schools are identifiable and separable. Second, the state has a legitimate interest in promoting the general welfare and the secular education of all school children. Third, the state may enact programs to promote the general welfare which include sectarian school students among the recipients provided the aid given has no inherent religious significance (*e.g.*, bus rides, public health services), even though the aid may facilitate the operation of sectarian schols. Fourth, the state may enact programs to promote secular education in accredited schools, including church-related schools, provided the state can be certain from the nature of the aid granted or the restrictions placed upon its use that the programs will assist only secular education in church-related schools and provided further that the restrictions required to insure secular use do not give rise to excessive government entanglement with religion in the administration of the aid program. Finally, in order for a court to conclude that a statute has the constitutionally impermissible effect of advancing religion, the

6. The Court also found that the legislation did not foster excessive government entanglement with religion.

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court is not required to conclude that the scheme of assistance will necessarily aid religion; the court can conclude that the statute has the effect of advancing religion if the terms of the statute fail to preclude a possible use of government funds to promote religious exercises.

The Act under review reimburses parents who have expended money for tuition at nonpublic schools. The legislative findings and declaration of policy underscore the legislative judgment that this type of aid will have the effect of enabling nonpublic schools, which include church-related schools, to continue to operate in Pennsylvania. The cases are clear that the state cannot directly support religious education in church-related schools although in some circumstances the state may provide sectarian schools with "secular, neutral or nonideological services, facilities, or materials." *Lemon, supra,* 403 U. S. at 616. The present Act contains no provisions to insure that state funds are restricted to such purposes. Clearly an unrestricted grant of funds by the state directly to church-related schools would constitute state support of religious instruction and worship in violation of the Establishment Clause.

> "* * * General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz, supra,* 397 U. S. at 690 (Brennan, J. concurring).

Recognizing this, defendants maintain that the Act is constitutional because the Act aids the parents and not the schools. The state enters into no direct relationship with nonpublic schools because funds are paid directly to parents who have paid tuition to nonpublic schools. Once the parents receive the funds, the state has no control over their use.[7] Furthermore, defendants

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7. Defendants cite *Hysong v. Gallitzin Borough School District,* 164 Pa. 629 (1894), for the proposition that payment of state funds

argue that in *Everson* and *Allen* the Supreme Court distinguished between aid to parents and students and aid to institutions and held that state aid to parents and students does not have the primary effect of advancing religion even though sectarian schools benefit from transportation services and non-religious textbook loans.

First, we disagree with defendants' reading of *Everson* and *Allen*. The critical factor in both cases was that the subsidized school activities were nonideological or secular and therefore the public grants did not directly support religious education in the sectarian schools, although the aid did support the operation of the schools. But the fact that aid is given to parents in itself does not prevent the subsidy from having a primary effect of supporting religious instruction and worship in church-related schools. In *Allen*, the fact that the Court considered the parents and students

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is not unconstitutional because the recipients may use these funds for religious purposes. *Hysong* involved the question of whether a public school could employ Catholic nuns to teach secular subjects. One argument raised by plaintiffs was the fact that the nuns had taken a vow of poverty and turned over their salaries to their church and therefore state salary payments were being used to support religion. The Pennsylvania Supreme Court rejected this argument on the grounds that "American men and women, of sound mind and twenty-one years of age, can make such disposition of their surplus *earnings* as suits their own notions." *Hysong, supra,* 164 Pa. at 656 (emphasis added).

Hysong is clearly distinguishable from the case before us because there is no question that individuals are free to dispose of money earned by them in the course of their employment for whatever purposes they choose, including support of religion. In fact the principle of government neutrality in religious affairs is premised on the belief that religions should be supported solely by the voluntary contributions of their members. In determining whether state payments under the Act are constitutional, we must examine the criteria which qualify an individual for receipt of the funds. Certainly there can be no objection to state payments to state employees for secular teaching services in the public schools. The issue before this court is whether individuals may receive state funds solely because they have paid tuition at a church-related school.

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as the beneficiaries of the aid would not have prevented the Court from striking down the law if it provided for loans of religious books to the schools. The school aid cases emphasize that the court must examine the character of the aided activity rather than the manner in which aid is given in order to determine whether the state subsidy has the primary effect of advancing religion.

Second, we conclude that the effect of the Act is to aid the schools and therefore the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional.[8] Parents are eligible to receive payments under the Act because they have paid tuition at a nonpublic school. Tuitions are the "very life blood" of private educational institutions, *Almond v. Day*, 197 Va. 419, 427, 89 S. E. 2d 851, 857 (1955), because they are the source from which many educational services, secular as well as religious, are funded. If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are unable to pay these costs, the schools will be forced to close. It was precisely this possibility that led the Pennsylvania General Assembly to pass the Act under review. By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools. The necessary effect of such a program, if it is to succeed, is that the schools will be aided by state funds. The state cannot main-

8. If the Act did include restrictions on the use of the funds, the Act would also have to avoid excessive government entanglement with religion in its administration of these restrictions. *See Lemon* and *Tilton*. The combination of the primary effect and entanglement tests clearly restricts the scope of permissible government aid to religious schools.

tain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid these schools.

Defendants argue that we cannot ascertain that parents will be encouraged to send their child to church-related schools because of the state aid program. Parents may send their child to a sectarian school one year and despite the reimbursement payment decide to enroll their child in another type of school the next year. Therefore defendants argue that we cannot conclude that the Act has the necessary effect of advancing religion. However, *Tilton* established that a government aid program can be invalidated on the basis of a significant risk that the aid may serve to support religious activity at some future time. In *Tilton*, there was no evidence that the colleges receiving construction grants planned to convert the buildings into chapels or otherwise use them for religious activities after twenty years had passed. Nevertheless, the Court found the possibility of such use enough to strike down the provision of the statute which permitted unrestricted use of the buildings after twenty years. It is clear that a possible and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools. Tuition payments support both religious and secular education at these schools. The mere fact that the Act does not require that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities.

State courts have held that tuition grant programs in which the state channeled funds through the parents or students to the schools violate the First Amendment and state constitutional provisions.[9] *Almond v. Day, supra,*

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9. "The parent or guardian to whom the tuition fees are paid is merely the conduit or channel through whom the aid from the State

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Hartness v. Patterson, 179 S. E. 2d 907 (S. Carolina 1971), *Opinion of the Justices*, 259 N. E. 2d 564 (Mass. 1970). Defendants argue that unlike the "conduit" plans, the Pennsylvania Act does not make payments to parents in a form that can only be used at an educational institution. Therefore, it cannot be established that the dollar used to pay tuition is the dollar the parents received from the state. However, we do not perceive any constitutional significance in the fact that payments are made in the form of reimbursement to the parents, a conduit plan or directly to the school. The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family incomes through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education.

Finally, even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children. It would seem indisputable that at least one, if not the main, purpose of a parent's sending his child to a religious school is to insure the early inculcation of religion. *See Walz, supra*, 397 U. S. at 671. Assuming equal secular educational standards as between public and religious schools, it is an almost inescapable sequitur that the statutory reimbursement is solely to en-

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to the school is transmitted." *Almond v. Day, supra*, 89 S. E. 2d at 857.

"We reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid." *Hartness v. Patterson, supra*, 179 S. E. 2d at 909.

able the parents to augment the public school secular education with religious training. If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so. *See Brusca v. State of Missouri ex rel. State Bd. of Ed.*, 332 F. Supp. 275 (E. D. Mo. 1971).

Having concluded that the Establishment Clause precludes state reimbursement of sums that parents have paid as tuition to schools that provide religious education, we need not consider defendants' arguments that the complaint should be dismissed for lack of standing and failure to state a claim under the Free Exercise and Equal Protection Clauses. We therefore deny defendants' motion to dismiss the complaint.

Order.

AND NOW, this 6th day of April, 1972, it is ORDERED that the defendants' motion to dismiss the complaint be and it hereby is DENIED.

BY THE COURT

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

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Order.

AND NOW, this 28th day of April, 1972, upon consideration of the motions of the defendant and intervening defendants to dismiss Counts 2 and 3 of the plaintiffs' complaint, it is ORDERED that they be and hereby are GRANTED on the authority of *Lemon v. Kurtzman*, 310 F. Supp. 35 (E. D. Pa. 1969).

BY THE COURT

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

Order.

AND NOW, this 20th day of June, 1972, it is ORDERED as follows:

1. It appearing that the plaintiffs seek no relief against the intervenors SETH W. WATSON, JR. and ANNE P. WATSON, his wife, the motion for summary judgment of said intervenors is DENIED without oral argument.

2. Oral argument on the plaintiffs' motion for summary judgment shall be had on Thursday, July 6, 1972, at 10:00 a.m., under the following terms and conditions:

(a) Plaintiffs shall be permitted thirty minutes for argument and the defendants shall be entitled to thirty minutes for argument to be divided among the State and intervenors as they may see fit.

(b) The parties shall direct their arguments to the following:

(i) whether the holding denying the motion to dismiss requires the entry of judgment for the plaintiffs;

(ii) whether on its face and in light of the fact that the majority of students enrolled in Pennsylvania nonpublic schools attend church-related schools, the Act can properly be viewed as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related.

FOR THE COURT

JOSEPH S. LORD, III
Ch. J.

Order.

AND NOW, this 21st day of July 1972, upon consideration of the entire record, the briefs and arguments of the parties, and of amici curiae, and it appearing that more than 90% of the children atetnding nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith, and in accordance with our Opinion dated April 6, 1972,

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denying the motion of the defendant to dismiss, it is ORDERED as follows:

1. The motion of the plaintiffs for summary judgment is GRANTED;

2. The defendant Grace Sloan, and her successors in office, be and they hereby are perpetually enjoined from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the "Parent Reimbursement Act For Nonpublic Education" either directly or by way of reimbursement to parents of children attending nonpublic schools.

BY THE COURT

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

Motion to Alter or Amend Judgment Under Rule 59(e).

Intervenor defendant Crouter in the above matter, by his attorney, Henry T. Reath, Esquire, and Duane, Morris and Heckscher, moves Your Honorable Court to alter or amend its Order and Judgment of July 21, 1972, in the following respects and for the following reasons:

1. On July 21, 1972, a three judge Court, consisting of the Honorable Judges Hastie, Lord and Hannum, handed down its Order, copy of which is attached, granting plaintiffs' motion for summary judgment.

2. Intervenor defendant now moves Your Honorable Court to strike from said Order the following language:

> ". . . and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith, . . ."

3. There is no evidence of record that would support the foregoing statement of fact. To the contrary, the allegations bearing on the religious practices of schools who charge tuition that would be eligible for parent reimbursement, are contained in paragraph 10 of plaintiffs' complaint, all of which allegations were denied and put at issue in defendants' answer and that of intervenor defendants.

4. There is no evidence in this record as to the number of parents applying for reimbursement under the Act, since all the applications have not yet been received or processed. Furthermore, the application form does not require nor does the Act itself permit answers or inquiry regarding the religious or nonreligious practices of said schools. The

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only eligibility requirement is that the school meet the compulsory educational requirements of the Commonwealth.

5. Furthermore, said allegations were the subject of a special motion to strike filed on behalf of Your Petitioner on the grounds that said allegations were improper and irrelevant conclusions of law, and that any such inquiry into said facts insofar as parents eligible under the Act are concerned, violates their constitutional rights.

WHEREFORE, Your Petitioner respectfully moves the three judge Court to strike from its Order and Judgment the language quoted above in paragraph 2.

HENRY T. REATH,
for
DUANE, MORRIS & HECKSCHER,
Attorneys for Intervenor Defendant, Crouter.

Order.

AND NOW, this 3rd day of August, 1972, it is ORDERED that the motion of the intervenor defendant Crouter to alter or amend the judgment under Rule 59(e) be and it hereby is DENIED.

FOR THE COURT

JOSEPH S. LORD, III,
Ch. J.

Notice of Appeal.

Notice is hereby given that Henry E. Crouter, intervenor defendant in the above-captioned matter, appeals to the Supreme Court of the United States from the entire Order dated July 21, 1972, granting summary judgment to the plaintiffs and perpetually enjoining defendant Sloan from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the "Pennsylvania Reimbursement Act for Nonpublic Education".

This appeal is taken pursuant to 28 U. S. C. § 1253.

HENRY T. REATH,
for
DUANE, MORRIS & HECKSCHER,
Attorneys for Intervenor Defendant, Crouter.

August 21, 1972.

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No. 92.

AN ACT.

HR 1379

Creating an authority for the purpose of avoiding increased costs of public education by providing partial reimbursement for nonpublic education and defining its powers and duties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short Title.—This act shall be known and may be cited as the "Parent Reimbursement Act for Nonpublic Education."

Section 2. Legislative Finding; Declaration of Policy.—It is hereby determined and declared as a matter of legislative finding:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective the Commonwealth has had in force for many years a compulsory school attendance law.

(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact

of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established.

Section 3. Definitions.—The following terms, whenever used or referred to in this act, shall have the following

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meanings, except in those instances where the context indicates otherwise:

(1) "Parent" means a resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis to such child.

(2) "Nonpublic school" means any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

(3) "Student" means a resident of the Commonwealth of Pennsylvania who is enrolled in a nonpublic school.

(4) "Parent Reimbursement Fund" means the fund created by this act.

Section 4. Pennsylvania Assistance Authority.—There is hereby created a body corporate and politic to be known as the Pennsylvania Parent Assistance Authority, which shall consist of five members appointed by the Governor and which shall have responsibility for the administration of the program created by this act. All members shall be of full age, citizens of the United States, and residents of the Commonwealth and shall be appointed for terms of five years each. The members of the authority shall select from among themselves a chairman and a vice-chairman. The authority may employ a secretary and such other employes as it may require. Three members of the authority shall constitute a quorum for its meetings. Members shall receive no compensation for their services but shall be reim-

bursed for their expenses actually and necessarily incurred by them in the performance of their duties under this act. The authority shall have power to make and promulgate rules and regulations for the administration of this act: Provided, however, That it shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools.

The authority shall have no power, at any time or in any manner to pledge the credit or taxing power of the Commonwealth, nor shall any of its obligations or debts be deemed to be obligations of the Commonwealth, and all contracts between the authority and parents or other persons in loco parentis shall be satisfied solely from funds provided under this act.

Section 5. Parent Reimbursement Fund.—There is hereby created for the special purpose of this act, a Parent Reimbursement Fund. Beginning July 1, 1971, twenty-three per cent of the tax revenue collected by the Department of Revenue, pursuant to the act of July 22, 1970 (P. L. 513), known as the "Pennsylvania Cigarette Tax Act," shall be paid into the State Treasury to the credit of the Parent Reimbursement Fund.

Moneys in the Parent Reimbursement Fund are hereby appropriated to the Pennsylvania Parent Assistance Authority, to be used solely for the purposes of this act.

All expenses incurred in connection with the administration of this act shall be paid solely out of the Parent Reimbursement Fund.

Section 6. Eligibility.—In order to be eligible for tuition reimbursement hereunder, the parent of a student

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shall, at the completion of the school year but not later than July fifteenth, file with the Parent Assistance Authority a verified statement that the student has completed the school year in a nonpublic school or schools and, in addition, the following information: (i) the name and address of the parent; (ii) the name, address and birth date of the student; (iii) the name and address of the nonpublic school or schools in which the student completed the school year and (iv) a receipted tuition bill or copy of the executed contract under which the student attended the nonpublic school or schools.

Section 7. Tuition Reimbursement Payments to Parents.—Upon the filing by a parent of the verified statement as required by section 6, the Parent Assistance Authority shall make a tuition reimbursement payment to such parent in the amount of (i) seventy-five dollars ($75) for each elementary school student to whom the parent bears a parental relationship and one hundred fifty dollars ($150) for each secondary student to whom the parent bears a parental relationship, or (ii) the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser.

Reimbursement payments to parents hereunder shall be made not later than September fifteenth in the school year following the school year for which tuition reimbursement payments are being made.

Section 8. Penalties.—The Parent Assistance Authority shall have power to employ means reasonably necessary to determine the accuracy of all statements submitted by parents in connection with reimbursement payments hereunder. Any person who, by means of a willfully false statement, secures or attempts to secure or aids or abets any person in securing reimbursement payment hereunder, shall

be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not exceeding one thousand dollars ($1,000), or to undergo imprisonment not exceeding one year, or both, and shall also be sentenced to make restitution of any moneys he has received by reason of any false statement.

Section 9. Insufficient Moneys in Fund.—In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Parent Reimbursement Fund shall be insufficient to pay the total number of claims submitted by parents to the Parent Assistance Authority, the reimbursement payments provided for in section 7 shall be proportionate in amount to the per cent which the total amount of moneys in the Parent Reimbursement Fund bears to the total amount of claims.

Section 10. Severability.—If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 11. Effective Date.—This act shall take effect immediately.

APPROVED—The 27th day of August, A. D. 1971.

MILTON J. SHAPP

The foregoing is a true and correct copy of Act of the General Assembly No. 92.

C. DELORES TUCKER
Secretary of the Commonwealth.

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